

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

4 ANTHONY D. KOLTON, et al.,) Docket No. 16 C 3792
5)
6 Plaintiffs,)
7)
8 vs.)
9)
10 MICHAEL W. FRERICHS, Treasurer of)
11 the State of Illinois,) Chicago, Illinois
12) December 16, 2021
13)
14 Defendant.) 9:50 o'clock a.m.

10 TRANSCRIPT OF TELEPHONIC PROCEEDINGS - STATUS AND MOTION
BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

13 For the Plaintiffs
14 Via Telephone:
15
16 LAW OFFICES OF ARTHUR SUSMAN
17 BY: MR. ARTHUR SUSMAN
18 1540 N. Lake Shore Drive, 3N
19 Chicago, IL 60610
20
21 For the Defendant
22 Via Telephone:
23
24 MS. SARAH HUGHES NEWMAN
25 Illinois Attorney General's Office
26 100 W. Randolph St., 13th Floor
27 Chicago, Illinois 60601
28
29 Court Reporter:
30
31 MS. JOENE HANHARDT
32 Official Court Reporter
33 219 S. Dearborn Street, Suite 1744-A
34 Chicago, Illinois 60604
35 (312) 435-6874

PROCEEDINGS RECORDED BY

MECHANICAL STENOGRAPHY

TRANSCRIPT PRODUCED BY COMPUTER

1 THE CLERK: 16 C 3792, Kolton, et al., vs. Frerichs.
2 Status and motion for leave to file.

3 Please state your name for the record and the party
4 that you represent each and every time you speak.

5 MS. SAUNDERS (Via Telephone): Good morning, your
6 Honor, Terry Saunders on behalf of --

7 THE COURT REPORTER: Ms. Saunders, there is too much
8 static and you are not coming through. Could you please repeat
9 yourself?

10 MS. SAUNDERS (Via Telephone): I am having problems
11 with my phone. You can't hear us?

12 THE COURT: Oh, now you are much better, Ms. Saunders.
13 Good morning.

14 MS. SAUNDERS (Via Telephone): Oh, all right.

15 Well, we will just keep it closer. I don't --

16 MR. SUSMAN (Via Telephone): More it closer.

17 MS. SAUNDERS (Via Telephone): Okay. All right.

18 Mr. Susman is here, also.

19 THE COURT: Good morning, Mr. Susman.

20 MR. SUSMAN (Via Telephone): Good morning.

21 THE COURT: And I think Ms. Newman is here, also.

22 We had heard a little of your conversation before we
23 got official.

24 Ms. Newman, are you here?

25 MS. NEWMAN (Via Telephone): Yes, your Honor.

1 Sara Newman on behalf of the Treasurer.

2 THE COURT: Good morning, Ms. Newman.

3 MS. NEWMAN (Via Telephone): Good morning.

4 THE COURT: Anybody else on your side?

5 MS. NEWMAN (Via Telephone): I believe I am the only
6 one here.

7 THE COURT: Okay.

8 Well, I am going to -- the real issue -- any motion
9 for leave to file, I think, that is oversized; all of that is
10 granted, but the real issue -- was the amount of fees that has
11 been contested in this case. And that is what I am going to
12 address.

13 I have prepared a few remarks. So, I will just read
14 them into the record and tell you what the outcome is at the
15 end of it. It should not be terribly long.

16 We apologize for the delay in getting started. The
17 pandemic is playing havoc with courtroom space. And, so, here
18 we are.

19 I am in Judge Norgle's courtroom, but this is Judge
20 Kocoras. So, do not mix up the two "Charles." Okay?

21 (Laughter.)

22 MS. SAUNDERS (Via Telephone): Okay.

1 I ordered that plaintiffs' counsel provide to us what
2 a lodestar calculation would look like. And they have done so.

3 Am I coming through okay to the lawyers on the phone?

4 Are you able to hear me?

5 MS. SAUNDERS (Via Telephone): Yes, you are. You are
6 to us, your Honor.

7 THE COURT: Ms. Newman?

8 MS. NEWMAN (Via Telephone): Yes, your Honor. You are
9 coming through loud and clear. Thank you.

10 THE COURT: Okay, thank you.

11 The lodestar method produces 1706.15 hours of attorney
12 time and a lodestar total of \$1,314,530.

13 The defendant has filed a response to plaintiffs'
14 supplemental declaration and has lodged a host of criticisms to
15 the supplemental declaration of counsel.

16 Among the criticisms are as follows:

17 One, the rates ranging from six to nine-hundred
18 dollars per hour are quite excessive when civil rights
19 litigators' top rates are four-hundred-and-fifty to
20 five-hundred-and-fifty dollars per hour.

21 Another criticism is it took too much time in the
22 district court briefing, researching, drafting and defending
23 the fee petition, and even class counsel's expert says a
24 multiplier of 7.23 falls at the high end of the range.

25 A true multiplier, it is argued, would be higher if

1 applied to more reasonable rates of hourly pay and reasonable
2 hours.

3 And, additionally, it is argued that the multipliers
4 used by plaintiffs' expert are in highly specialized areas and
5 sophisticated business entities as plaintiffs.

6 Many of the requested awards represented fairly low
7 percentages in exceptionally high settlements or judgments.
8 And it cites to their conclusion that the Seventh Circuit says
9 a multiplier of 2 may be a sensible ceiling.

10 Those are some of the criticisms.

11 Also, the use of junior lawyers, at lesser rates,
12 might have been appropriate for some of the work done, although
13 that puts in another layer of supervision. And, so, whether
14 that is an end game or not, I do not know.

15 There is an excessive request for fees on fees.

16 The defendant has distinguished some cases with high
17 percentage of funds because the fee percentage, itself, was
18 pre-approved. Not so in this case.

19 In any event, the bottom line, from the defense point
20 of view, is that any fee award should not exceed \$2,629,060.
21 And I have considered that. I have looked at a number of the
22 cases cited by both sides.

23 And since I have presided over this case from the
24 beginning, other than when a sojourn to the Court of Appeals
25 was undertaken in a couple of instances, I am quite familiar

1 with the case. And here is both the plaintiffs' reply, and
2 reflective of my own thoughts; but, let me, at least for the
3 record, talk about what the plaintiffs say by way of
4 justification: That they brought a highly risky class action
5 to overturn an unconstitutional state law; and, their efforts
6 produced a return of tens of millions of dollars to unclaimed
7 property owners; they were involved in two successful appeals
8 to the Seventh Circuit; and, the case, itself, and the law of
9 the case, established the right of unclaimed property owners to
10 income which the state earned while the property was in its
11 hands; and, that right of the return to the true property
12 owners does not depend on what the property owner had been
13 earning while the property was in the owners' hands.

14 It is argued in the plaintiffs' papers that no other
15 firm or lawyer has successfully brought such a case, at least
16 not in Illinois.

17 It is also argued to me that plaintiffs' counsel has
18 not only brought about successful appeals, but has settled the
19 case and helped establish a blueprint for all similar claims in
20 the future.

21 To be the first in any field is also to assume the
22 greatest possible risk in the endeavor undertaken, that will
23 never exist, again.

24 When you are second or third or fourth, there is
25 something to look forward to, by way of precedent. Not in this

1 case.

2 In this type of case, reliance on the lodestar method
3 to set parameters on legal fee awards, while helpful in some
4 circumstances, cannot dictate the limits of any award.

5 The nature of the issues here and the risks to be
6 assumed dictate that a sophisticated lawyer would strike a
7 contingent fee arrangement rather than use a lodestar method of
8 compensation.

9 An undertaking for legal services, with the risks
10 presented due to unchartered Illinois legal territory, would
11 involve the common fund doctrine as the best and fairest way to
12 measure the worth of legal services, in my considered opinion.

13 The Treasurer has repeatedly used the description
14 "civil rights" to characterize the nature of this case, and
15 offered a comparison of approved fees in other civil rights
16 cases as a barometer for the legally-appropriate award.

17 The pure fact of the matter is that this is not what
18 is classically understood as a civil rights case. The issues
19 here do not involve physical or unlawful harm to individual
20 citizens, but, rather, a failure to pay for possession and
21 possible use of property belonging to somebody else.

22 The underlying facts are unique onto themselves and
23 more closely approximate the tort of conversion or inverse
24 condemnation.

25 Many of defendant's cited cases involved claimed

1 violations of a person's rights and freedoms, making inapt fee
2 comparisons for dissimilar subject matter and procedures.

3 There are some instances when the lodestar method is
4 more appropriate in determining the proper award of fees and,
5 in other instances, when they can be helpful.

6 But super-imposing the results of the lodestar method
7 over a common fund percentage method, or mixing the methods
8 with predominance to the lodestar calculation, leads only to
9 the wide disparity between the parties that has been presented
10 to the Court for decision.

11 It is this Court's view that a capable and reasonably
12 sophisticated lawyer presented with this case in the first
13 instance by a plaintiff, or a class of plaintiffs in Chicago,
14 would take this case only on a contingent fee basis, based on
15 the anticipated needs of the case and the risks inherent in the
16 undertaking, including the real risk of loss.

17 Based on that premise, the percentage of the fund
18 doctrine is superior to the determination of the legal fees to
19 be awarded to plaintiffs' counsel, and is used by the Court as
20 a guide in its decision.

21 There is no decided case and no single methodology or
22 mathematical formula which supplies the answer as to the amount
23 of reasonable fees to be awarded.

24 The principal criteria in the determination of the
25 amount and which guides the analysis are as follows:

1 One, the uncertainty of the outcome of the lawsuit;
2 hence, the degree of risk in the legal undertaking by counsel.

3 Two, the skill and ability of counsel and the
4 representation they provided, both in the District Court, the
5 Court of Appeals and in helping fashion a settlement agreeable
6 to all of the parties and to this Court.

7 Alternatives to the resolution at hand would have
8 included time-consuming and lengthy administrative efforts to
9 calculate benefits to each class member at some cost and delay,
10 which, at all odds, would have been substantial.

11 The pioneering effort in bringing the action in the
12 first instance and, most significantly, achieving success and
13 prevailing in the courts, that is a major, major factor in my
14 analysis.

15 The strategies employed and the expertise in
16 effectuating the victories earned were, by any measure, first
17 rate.

18 As we all know, hindsight supplies perfect vision. It
19 must be kept in mind the success for the plaintiffs was never
20 ordained at the outset of the proceedings. The estimated
21 recovery to the class has been suggested to run from \$47
22 million to \$70 million.

23 Whatever it may turn out to be, the significance of
24 the result is undeniable and far reaching.

25 Having no simple or four-square guidance to determine

1 a fair and reasonable award to plaintiffs' counsel for their
2 fees, the Court is left to simply determine an amount which it
3 believes is fair and just and appropriate under the
4 circumstances.

5 And, so, that is precisely what I did in this case. I
6 wrote down a variety of possible outcomes and possible fee
7 awards, looked at them all, considered the entirety of the
8 case, the difficulties I have alluded to in prosecuting in the
9 first instance, the successes achieved, the sophistication
10 necessary to argue both in the District Court and, especially,
11 in the Court of Appeals, and bring about the result that we are
12 now living with.

13 So, putting all of that together, and with no formula
14 to produce it, other than one's sense of what is fair and
15 appropriate, it is my determination that the fee award shall be
16 not in the amount claimed of \$9.5 million, but, rather, \$7.5
17 million, which I think is less than requested, but, actually,
18 candidly, considerably more than what the defendant thinks
19 would be fair.

20 That is what I think is fair: \$7.5 million.

21 And we have some additional expenses and costs of
22 \$17,913.

23 And, so, that is the amount that I will assess by way
24 of costs.

25 And it is also my determination, although there is a

1 contest about it, that the fee shall be paid directly from the
2 Fund; and, that all of the beneficiaries of the work of the
3 lawyers be responsible for the payment of the fees, it should
4 come from the Unclaimed Property Fund, as opposed to any other
5 form, such as payment when each claimant get their share of
6 whatever the successful pot may be.

7 So, I think that covers all of the lingering issues in
8 the case. And, as I say, that is my best judgment.

9 I think, probably, in all candor, there are other
10 possible awards that would also be deemed reasonable and
11 proper, but the one I settled was the one that I thought was
12 most appropriate under these special circumstances.

13 And I do not know what else I can add to my
14 presentation, but I am quite willing to answer any questions
15 you think I have left open, in covering what I thought was,
16 essentially, the final determination in this case.

17 Either side has the mike.

18 And I probably wound up displeasing both sides, but
19 that is in the nature of the proceeding.

20 (Laughter.)

21 MS. SAUNDERS (Via Telephone): Right.

22 THE COURT: Is there anything you want to add, Ms.
23 Saunders?

24 MS. SAUNDERS (Via Telephone): Your Honor, there are
25 no questions. And we just want to thank the Court really for

1 all of your hard work, reflected in certainly what you have
2 written today. And we appreciate the positive comments that
3 you made.

4 And we also thank you for your patience during these
5 last couple years as we worked this agreement out.

6 So, I don't think we have any -- we certainly don't
7 have any -- questions.

8 And we really thank you and appreciate, you know, all
9 of the effort and hard work that you put into this.

10 THE COURT: Well, you are quite welcome.

11 Ms. Newman, I know you are probably more unhappy than
12 Ms. Saunders, but I will compliment --

13 MS. NEWMAN (Via Telephone): Well, I mean, obviously,
14 that is not the -- it is the -- outcome that we were hoping
15 for. But we, obviously -- the thought that you -- you know,
16 the thought and consideration that you -- put into the issues,
17 clearly you did consider our arguments and our criticisms and
18 we do appreciate that.

19 One issue, it is really moot now, based on your
20 ruling, but I told -- I did tell -- plaintiffs' class counsel
21 that I would give you this information. So, I am just, you
22 know, keeping my word and go ahead and say so: That, as stated
23 in the Joint Status Report, the Treasurer has already begun
24 paying interest to the (b) (2) claimants on an on-going basis,
25 and will begin paying the (b) (3) claimants on December 20th, as

1 required by the final judgment.

2 And when making these payments, the Treasurer is not
3 deducting -- has not been deducting -- any amount from interest
4 payment for the attorneys' fees; and, the Treasurer withdraws
5 it argument that the attorneys' fees do need to be deducted
6 from the payment to class members.

7 Again, I know that is moot because you already held --
8 you just held the -- you just held that the payments should
9 come from the Fund, rather than being deducted from individual
10 payments. But I just wanted to keep my word and tell you that.

11 I know that it's moot, but I will keep my word to
12 class counsel and tell you that we withdraw that argument.

13 THE COURT: All right.

14 Well, I appreciate that.

15 What I did want to say was I thought your advocacy was
16 particularly helpful and vigorous.

17 While I did not, essentially, agree with some of it,
18 as I decided and expressed, the fact that you went to such
19 detail and supplied me with, in many instances, a compelling
20 point or position, was what helped me go through both sides'
21 claims and justifications for their respective positions.

22 So, whatever the ruling was and whoever it most
23 favored, without your, I think, even tenacious advocacy, it
24 would not have come out maybe the same way. And, who knows, it
25 might have been a little higher.

1 But I will say that your research was quite helpful in
2 crystallizing my own thoughts and making my determination. So,
3 that is what I wanted to tell you. I appreciate that kind of
4 advocacy and it was well worth the exercise, whatever the
5 outcome.

6 All right. I do not know if --

7 MS. SAUNDERS (Via Telephone): Thank you, your Honor.

8 THE COURT: I am not going to weigh into the thicket
9 of whether something has to be recalculated because some
10 payments have already been made, but I will leave that to the
11 lawyers and the administrators and the administration of the
12 Fund.

13 And, hopefully, that will close the case, from my
14 point of view. All right?

15 Thank you, both sides. Have a good day.

16 And, as we always say in the trade -- not that law is
17 a trade, but a profession -- we will see you on the next case.
18 Okay?

19 (Laughter.)

20 MS. SAUNDERS (Via Telephone): All right.

21 We are ready for the next case, your Honor.

22 THE COURT: All right.

23 MS. SAUNDERS (Via Telephone): But, also, we want to
24 all wish you a very Merry Christmas and Happy New Year.

25 THE COURT: The same to everyone who celebrates any of

1 the high holidays --

2 MS. SAUNDERS (Via Telephone): Many of them.

3 THE COURT: -- for which you believe.

4 Thank you so much.

5 Thank you, Ms. Newman.

6 MS. SAUNDERS (Via Telephone): Thank you.

7 MS. NEWMAN (Via Telephone): Thank you, your Honor.

8 THE COURT: Okay. Good day.

9 MS. NEWMAN (Via Telephone): Good day.

10 MS. SAUNDERS (Via Telephone): Thank you.

11 THE COURT: All right. Bye-bye.

12 * * * * *

13 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

14

15 /s/ Joene Hanhardt
Official Court Reporter

December 20, 2021

16

17

18

19

20

21

22

23

24

25